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IN THE
SUPREME COURT OF THE UNITED STATES

CAPITAL CASE

WILLIAM VAN POYCK,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER WILLIAM VAN POYCK

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ARGUMENT

I. THIS CASE PROVIDES THE COURT WITH THE OPPORTUNITY TO ELABORATE ON THE QUESTION LEFT OPEN IN *BRADSHAW V. STUMPF.*

In *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), this Court refrained from fully deciding whether a prosecutor's use of allegedly inconsistent theories violated a defendant's due process rights, commenting that it would be "premature" for the Court to resolve that issue before the Court of Appeals did so. However, this Court warned that "it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination." *Bradshaw*, 545 U.S. at 187. Consequently, this Court remanded for findings as to whether a later inconsistent position taken by the prosecutor amounted to a due process violation.

This case takes the *Bradshaw* issue of "inconsistent theories" one step further, because here, some of the prosecutor's statements to the sentencing jury have now been exposed as misleading or even false. As noted in Justice Anstead's dissent to the decision below, the prosecutor argued during the penalty phase: "So again, it is important who the triggerman is. There is no doubt about it. It's important to your deliberations, okay." *Van Poyck v. State*, 961 So. 2d 220, 228 (Fla. 2007) (Anstead, J., dissenting). Today, both the State of Florida and the Florida Supreme

Court openly concede that Van Poyck was not the triggerman.

The State summarily argues, without significant analysis, that this case is unlike *Bradshaw*. In fact, the State does little more than quote the Florida Supreme Court's decision on this point. *See* Brief in Opposition at 21-22. Yet an examination of the two cases shows that they are far more similar than different. In *Bradshaw*, just as in this case, the State first argued for and obtained a death sentence for the defendant based upon the theory that he was the actual killer. In both cases the State also argued an alternative theory to justify a death sentence. In both cases the defendant was precluded from having his sentencers consider and weigh the mitigating *fact* (not just argument) that he was not the killer. In both cases the record establishes that the actual sentencers *believed* each defendant was the triggerman. And, subsequent to the imposition of each death sentence it came to light that the defendant was not the triggerman, but that the codefendant was.

But a fundamental question was left open after *Bradshaw*: whether a death sentence obtained under the state's theory that the defendant was the triggerman is rendered unconstitutional by the State and Florida Supreme Court's subsequent admissions that he was not the triggerman. Whether framed as an "inherently unreliable sentence" in violation of the Eighth Amendment, or as a sentence imposed under "a fundamentally unfair procedure" in violation of "the basic due process standard," the overriding constitutional issue here is the same as

that presented in *Bradshaw*: a death sentence based upon a lie cannot stand.

Put in that light, the State's claim that this case does not present a constitutional issue rings hollow. *See* State's Brief in Opposition at 20 (citing *Herrera v. Collins*, 506 U.S. 390 (1993)). As explained in the Petition, this case is unlike *Herrera* because Van Poyck is not seeking "additional process" beyond that under State law, nor is this a case where the evidence itself would have little chance of changing the factual predicate underlying Van Poyck's sentence. *See* Petition at 14 (citing and distinguishing *Herrera*.) This case, simply put, asks whether a fact-finder's wrong conclusion that defendant was the triggerman can ever be considered to have had no bearing on a subsequent death sentence.

For similar reasons, the State is wrong when it asserts that the issues in this case "are of no interest to anyone other than the parties to this litigation." State's Brief in Opposition at 23. An entire body of law, led by *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987), defines the circumstances and standards under which a non-triggerman defendant can be put to death. The notion that a fact-finder's wrong conclusion on triggerman status can ever be considered irrelevant in subsequent proceedings concerning the validity of a death sentence is a question that potentially affects each and every non-triggerman case. And when a question specifically left open in a recent decision of this Court is now squarely before this Court (now accompanied by a ruling on its merits), it is only logical to assume that

the question is of interest to the Court and to parties nationwide. These questions deserve to be definitively answered by this Court.

II. THE QUESTION OF HOW COURTS MUST EVALUATE NEWLY DISCOVERED EVIDENCE IS PROPERLY BEFORE THIS COURT.

The State's contention that Van Poyck has not "exhausted" issues involving the standard of review oversimplifies Van Poyck's arguments. Van Poyck does not claim that the Florida Supreme Court applied the wrong standard of review. As noted by the State, Van Poyck agrees that the "reasonable probability of a lesser sentence" is the controlling test.

Rather, the issue here is that, in *applying* that standard after exposing an important factual error underlying Van Poyck's conviction and sentencing (i.e., the fact that Van Poyck was not the triggerman), the Florida Supreme Court did not do what this Court's precedents arguably required it to do. When, as here, the judge and jury erroneously believed that the defendant was the triggerman, the court must follow one of three courses of action: reweigh the evidence, apply harmless error analysis, or remand for resentencing. Petition Section II. The Florida Supreme Court did none of the three.

Van Poyck does not purport to determine or establish the precise standards to be applied pursuant to the United States Constitution in cases like this one. Rather, Van Poyck respectfully submits, that task is reserved to this Court—not the Florida Supreme Court. These and similar issues

have permeated these proceedings, and Van Poyck disputes the State's contention that the issues raised in the Petition were not fully exhausted below. The proceedings below turned on the Florida Supreme Court's application of the standard of review; specifically, whether newly discovered evidence suggesting Van Poyck was not the triggerman would have created a "reasonable probability that Van Poyck "would have received a lesser sentence." All of the arguments involved the application of that standard. Yet the State now suggests that issues involving that standard are "unexhausted." State's Brief in Opposition at 17.

The State's Brief in Opposition simply misses its mark, and provides this Court no reason to deny the writ.

CONCLUSION

WHEREFORE, based upon the foregoing this Court should grant *certiorari* review to answer the questions presented.

Respectfully submitted,

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